IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

ORDER

S.B.CRIMINAL MISC. PETITION NO. 970/2005
(Deepali and Ors. Vs. State of Rajasthan & Anr.)

Date of Order : 16.08.2007

PRESENT

HON'BLE MR. JUSTICE H.R.PANWAR

Mr. H.S.S.Kharlia, for the petitioner.
Mr. Ashok Upadhyay, P.P. for the respondent State.
Mr. S.D.Vyas for the non-petitioner No.2.

BY THE COURT:-

By the instant criminal misc. petition under Section 482 Cr.P.C., the petitioners have challenged the order dated 30.7.2005 passed by Judicial Magistrate, Bar, district Pali (for short 'the trial court' hereinafter) whereby the trial court took the cognizance of the offences under Sections 420, 406, 380 and 120-B IPC against the petitioners and issued the process in Crime Report No.355/05 P.S. Raipur.

I have heard learned counsel for the parties. Carefully gone through the order impugned as also the record of the trial court.

It is contended by learned counsel for the petitioners

that there is no allegation against petitioner No.1 Deepali in the FIR as also in the statements of witnesses recorded by the police. It is further contended that the dispute is of civil nature and therefore, the criminal proceeding as such is not maintainable when the remedy before the Civil Court is available to the complainant. It was further contended that the Court at Bar has no territorial jurisdiction to inquire into and try the case as the first agreement was executed at Chandigarh and second and third agreement was executed at Jaipur and therefore, if at all any offence is made out, it can be tried at Chadigarh or at Jaipur but at any rate the Court at Bar has no jurisdiction. It was also contended that even the theft is alleged to be of 18.5.2003 which cannot be inquired into in the FIR lodged by non-petitioner NO.2.

Learned public prosecutor and counsel appearing for the respondent No.2 supported the order impugned and contended that the trial Magistrate was justified in taking cognizance of the offences on the basis of the material placed before it. Learned counsel appearing for the respondent No.2 complainant submits that the investigating officer was in hand-in-glove with the petitioners namely Dy.S.P. M.D. Gaur who was trapped in an Anti Corruption case and therefore, even if an attempt has been made by the investigating officer to favour the petitioners, the trial Magistrate is not estopped from taking

cognizance of the offences on the basis of the material available on record.

Learned counsel for the petitioner has relied on decision in Jai Parkash Vs. Dinesh Dayal and another 1991 Cri. L.J. 418 (Delhi), Y.Abraham Ajith and Others Vs. Inspector of Police, Chennai and Another 2004 SCC (Cri) 2134, Harjeet Singh Ahluwalia Vs. State of Punjab and another 1987 (1) Crimes 277, Ashok Chaturvedi and Others Vs. Shitul H. Chanchani and Another 1998 SCC (Cri) 1704 and in Hridaya Ranjan Pd. Verma & Ors. Vs. State of Bihar and Another JT 2000 (3) SC 604.

I have given my thoughtful consideration to the submissions made by the counsel for the parties.

The facts and circumstances giving rise to the instant petition are that the respondent No.2 lodged a first information report being FIR No. 03 dated 1.1.2004 with P.S. Raipur. The investigation ensued and after investigation, the police filed final report. On notice, the respondent NO.2 filed protest petition. The trial court on perusal of the material available before it including the statements of witnesses recorded by the police under Section 161 Cr.P.C., agreement dated 18.5.03, the family settlement and various affidavits placed before the investigating agency and the sale deed on record, came to the conclusion that prima-facie offences under Sections 420, 406, 380 and 120-B IPC are made out.

So far as contention of the counsel for the petitioner that agreement dated 18.5.03 has been executed at Chandigarh, various witnesses stated that agreement has been executed at Village Jhuntha, Tehsil Raipur, district Pali.

In Jai Parkash Vs. Dinesh Dayal and another (supra), Delhi High Court held that the circumstances referred above clearly indicate that the agreement between the parties was entered into at Bhadohi, the delivery of the woollen carpets was to be given by the petitioner to respondent No.2 at Bhadohi. When the disputes arose between the parties then they resolved and settled into the shape of another agreement dated 4.2.1988 between the parties at Bhadohi where respondent No.2 has its branch office. Simply because respondent No.2 has its head office at New Delhi, this circumstance in itself will not furnish any ground to respondent No.2 to take recourse to criminal proceedings against the petitioner at New Delhi because the agreement between the parties was entered into at Bhadohi and there is no denial about this fact that respondent No.2 has no branch office at Bhadohi.

In Y. Abraham Ajith and Ors. Vs. Inspector of Police, Chennai and Another (supra), the Hon'ble Supreme Court held that it is inevitable conclusion that no part of cause of action arose in Chennai and, therefore, the Magistrate concerned had no jurisdiction to deal with the matter. On these premises, the

proceedings were quashed. In that case, a complaint was filed in the Court of XVIIIth Metropolitan Magistrate Saidapet, Chennai for the offences under Sections 498-A and 406 IPC and Section 4 of the Dowry Prohibition Act, 1961. The Magistrate directed the police to investigate and after investigation charge sheet was filed by the police. When the matter stood thus, the appellants filed an application under Section 482 of the Code before the High Court alleging that the Magistrate concerned has no jurisdiction even to entertain the complaint even if the allegations contained therein are accepted in toto. According to them, no part of the cause of action arose within the jurisdiction of the court concerned. On examining the material of the case, the Hon'ble Supreme Court came to the conclusion that no part of cause of action arose in Chennai and therefore, the Magistrate concerned had no jurisdiction to deal with the matter.

In Harjeet Singh Ahluwalia Vs. State of Punjab and Another, (supra) Punjab and Haryana High Court held that the forum of adjudication and the place where the Police have to investigate the commission of alleged offence, cannot depend upon the sweet will of the complainant who may choose to shift to a place other than where the offence of criminal breach of trust is said to have been committed. The words "was required to be returned or accounted for" in Section 181 (4) of the Code have no nexus whatsoever with either the parental home of the

wife or any other place, where she chooses to reside after break down of the marriage. Neither of the Courts at those places would therefore have jurisdiction to try the offence of criminal breach of trust.

In Ashok Chaturvedi and Ors. Vs. Shitul H. Chanchani and Another (supra), the Hon'ble Supreme Court held that merely because an accused has a right to plead at the time of framing of charges that there is no sufficient material for such framing of charges as provided in Section 245 of the Code, he is not debarred from approaching the court even at an earlier point of time when the Magistrate takes cognizance of the offence and summons the accused to appear to contend that the very issuance of the order of taking cognizance is invalid on the ground that no offence can be said to have been made out on the allegations made in the complaint petition. Power under Section 482 has to be exercised sparingly and in the interest of justice. But allowing the criminal proceeding to continue even where the allegations in the complaint petition do not make out any offence would be tantamount to an abuse of the process of Court and therefore, there cannot be any dispute that in such case power under Section 482 of the Code can be exercised.

In Hridaya Ranjan Pd. Verma and Ors. Vs. State of Bihar and Anr. (supra) while considering the provisions of Sections 418, 420, 504, 120-B with Section 482 Cr.P.C., the

Hon'ble Supreme Court held that the section set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction.

I have carefully gone through the statements of complainant Dharmichand, Smt. Nathi Kawri, Balkishan, Surya Prakash, Arjunram, Irfan Ali and Mukesh as also statement of Nemichand Kothari. Except Nimichand Kothari, all other witnesses stated that the agreement of settlement was entered into, executed and signed by the parties including the petitioners at village Jhuntha, district Pali. However, witness Nemichand

stated that the settlement was arrived at on 18.5.2003 at Chandigarh and it was reduced to writing. However, petitioner Bhagchand has now resiled from the agreement. Even witness Nemi Chand also stated that J.P.Sharma, Manager was witness to the agreement. Mr. J.P.Sharma, filed an affidavit sworn before the Notary, Jaitaran, district Pali dated 22.12.2004 stating therein that earlier there was a dispute between the parties and for the settlement, he along with Nemichand Kothari and the complainant C. D.Jain went to Chandigarh, there they met petitioner B.C.Jain and Chandra Kala Jain and offered for the compromise to settle the dispute amicably. The talk of the settlement was initiated by C.D.Jain. Thereafter petitioners B.C.Jain, Smt. Chandra Kala Jain and Deepali came to village Jhutha (Rajasthan) at their residence, there Nemichand Kothari and J.P.Sharma who sworn the affidavit, were called, they came and a primary settlement was arrived at between C.D.Jain, Nathi Kanwari Jain, Sunil Jain, Smt. Lalita Jain, B.C.Jain, Chandra Kala Jain and Deepali Jain in the presence of the Motbirs namely Nemichand Kothari and J.P.Sharma deponent. What has been stated on oath in the affidavit by J.P.Sharma finds corroboration from the statement of the witnesses noticed above. Almost all witnesses stated that the settlement was arrived at and reduced to writing and signed at village Jhutha and therefore, in my view, the contention raised by the learned counsel for the petitioners

that the Court at Rajasthan has no jurisdiction cannot be accepted and deserves to be rejected since the occurrence took place at village Jhutha and Court at Barr district Pali, in my view, has territorial jurisdiction to inquire into and try the case.

So far as the offence of cheating is concerned, from the material available on record, in my view, there is sufficient material which construe the offence of cheating. In the instant case, right from inception i.e. at the time of reducing the settlement to writing, the petitioners had an intention not to go by the settlement in order to cheat the complainant. So far as the entrustment of property is concerned, there is sufficient evidence that shares in question were entrusted to the petitioners NO. 2 and 3 and therefore, it cannot be said that the ingredients for the offence under Section 406 IPC are not made out. There is clear evidence that the petitioners entered into a criminal conspiracy in order to cheat the complainant and misappropriate the shares. So far as allegation of theft punishable under Section 380 IPC is concerned, there is evidence that while the complainant was away, the petitioners No. 2 and 3 broke open the locks, doors and dishonestly and fraudulently taken away the articles from the lawful possession of the complainant and therefore, in my view, there is prima-facie sufficient material and grounds on the basis of which the trial court came to the conclusion that there is ground to proceed

against the petitioners for the offences under Sections 420, 406, 380 and 120-B IPC and accordingly took the cognizance and issued process. It cannot be said that there being no material prima-facie to come to the conclusion that the petitioners committed the offences for which the cognizance has been taken against them. It is settled law that investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate.

In Jagdish Ram Vs. State of Rajasthan, AIR 2004 SC 1734, the Hon'ble Supreme Court held that at the stage of taking cognizance, the Magistrate has only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The Apex Court further held that investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons.

The decisions relied on by learned counsel for the petitioners turn on their own facts and are of no help to the petitioners.

It is settled law that powers under Section 482 Cr.P.C. are to be exercised sparingly, consciously and in exceptional cases where it is brought to the notice of the Court that non-interference would result into serious and manifest injustice or would result in abuse of the process of the Court. In the instant case, no such case is made out. In this view of the matter, I do not find any error, illegality or perversity in the order impugned warranting interference in the inherent jurisdiction of this Court.

The criminal misc. petition is devoid of any merit and it is therefore, dismissed. Ad-interim stay order dated 09.09.2005 is vacated and stay petition stands dismissed.

(H.R.PANWAR),J.

rp